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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 83

UNITED STATES OF AMERICA, EX REL., ROGER TOUHY, PETITIONER

v.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENITENTIARY, JOLIET, ILLINOIS, AND GEORGE R. McSWAIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT GEORGE R. McSWAIN IN OPPOSITION

OPINIONS BELOW

The majority (R. 159-171) and dissenting (R. 171-173) opinions in the Court of Appeals are reported at 180 F. 2d 321.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1950 (R. 174). The peti-

tion for a writ of certiorari was filed on May 22, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a Federal Bureau of Investigation agent, ordered by a subpoena *duces tecum* issued in a habeas corpus proceeding by a state prisoner to produce certain Department of Justice records, could properly be adjudged guilty of contempt for failure to obey the subpoena, where the United States Attorney, appearing for him, offered the records to the court for its examination and a ruling as to their materiality and the public interest involved in their disclosure, and the court declined to make such an examination without counsel present.

STATUTE AND REGULATION INVOLVED

R. S. § 161, 5 U. S. C. 22, provides:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Department of Justice Order No. 3229, issued May 2, 1939, 11 F. R. 4920, provides:

> Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5, Section 22), it is hereby ordered:

All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY,
Attorney General.

STATEMENT

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois against Joseph E. Ragen, Warden of the Illinois State Penitentiary at Joliet, alleging that he was being illegally de-

tained in violation of his constitutional rights as a result of a conspiracy between certain authorities of the State of Illinois and of Cook County, Illinois, whereby he was tried, convicted and sentenced to imprisonment for 99 years for the alleged kidnaping of one John (Jake the Barber) Factor, a crime which petitioner claimed never occurred (R. 2-45, 91-92). In the course of the proceedings on this petition, counsel for petitioner caused (R. 115) a subpoena *duces tecum* to be issued to "George B. McSwain, Agent in Charge—Hon. Tom C. Clark, Federal Bureau of Investigation, Bankers Building, Chicago, Illinois, c/o Otto Kerner, Jr., United States Attorney," calling for the production of "certain records of investigation made and statements of witnesses taken and procured in connection with the alleged kidnaping of John (Jake the Barber) Factor in and about Chicago, Cook County, Illinois, in the months of July and August, 1933, including specifically transcript, records, memoranda, and other data with respect to certain show ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 19 to July 24, 1933, inclusive, together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause" (R. 113-114). The subpoena was served upon McSwain (R. 115, 135)

and upon United States Attorney Kerner "as the representative of the Department of Justice in this District" (R. 134).

On the return date of the subpoena, Mr. Kerner appeared for McSwain, Mr. Johnstone appeared for petitioner, and attorneys from the office of the Attorney General of Illinois and the office of the State's Attorney of Cook County appeared for Warden Ragen (R. 114). Called by Johnstone as his first witness, Kerner replied as follows to the query whether he had produced the documents requested: "We have not produced the documents requested by the subpoena, in compliance with Department of Justice Order No. 3229, and also by Supplement No. 2 dated June 6, 1947." He went on to refer to instructions he had received from the Attorney General, in a letter signed by Assistant Attorney General Alexander M. Campbell, to the effect that he should "decline to produce the records" and "proceed in accordance with the instructions given in Supplement No. 2 of Order No. 3229" (R. 115-116).[1]

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[1] Supplement No. 2, issued June 6, 1947 (R. 120-121), reads:

"To All United States Attorneys:

"Procedure to Be Followed upon Receiving a Subpoena Duces Tecum

"Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom

Judge Barnes read the subpoena, and in response to his query as to whether Johnstone wanted "anything in addition pursuant to that last clause," Johnstone replied: "No, sir. Specifically, I want the records of the show ups" (R. 118-119).

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the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the certified copy of the order as an answer to the demand to produce the records.

"It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

"It is not necessary to produce the original documents; copies of official records, removal of which from the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The

After the court inquired about the regulations in regard to the production of the documents, Kerner read Department of Justice Order No. 3229, Supplement No. 2, and 5 U. S. C. 22 (R. 119-121). After the judge stated he could not determine whether the documents were material until he saw them and Kerner agreed that this was correct, the following occurred (R. 123):

> By the Court: Now what? Is this relator to be deprived of having his counsel look at them?
>
> * * * * *
>
> By Mr. Kerner: It is a matter of discretion with the Court to ascertain whether or not they are material, and I will provide them for the Court's personal persual.
>
> By the Court: What can I do in looking at them without counsel looking at them? He cannot make his record on that.
>
> By Mr. Kerner: Well, I am standing on my instructions that I cannot produce them, on orders of the Attorney General.

Following a discussion by the court and counsel as to legal authorities, the court said (R. 124-125):

> I am of the opinion that the regulation as drafted is broader than the statute permits,

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records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

TOM C. CLARK,
Attorney General."

because the statute provides that these regulations shall only be valid to the extent that they are "consistent with law."

Now I cannot believe that any department head, no matter how exalted he may be, can say to the courts that the records of his department may not be available to the investigation of questions heard in the courts. That cannot be true. And whether or not these particular papers in question here are material, I don't know. But the parties to this proceeding have a right to have somebody other than the Department determine that question.

I would be very glad if this Court were not called upon to determine it, but apparently it is. And I want to proceed to determine that question. I want the advice of counsel in respect of my determination of it. I cannot look at these papers without the advice of counsel, without counsel advising me in what particular they may or may not be material. I want the advice of counsel for the relator, and I want the advice of counsel for the respondent. * * *

* * * * *

Now, howsoever you want to meet that question is all right with me. I am ready to rule on it. * * * If you can suggest a method whereby I can rule effectively I will be very glad to have it.

Kerner's suggestion, agreed to by all counsel, was that he should produce the documents before the judge in chambers with counsel present and read them (R. 125).

At the conference in the judge's chambers, Kerner stated that he would prefer his disclosures to be off the record because of "the dangerous character of certain things that I am going to reveal."[2] Johnstone then stated: "As far as I am concerned, I am perfectly willing to have the United States Attorney submit the material to the Court, and abide by the result. * * * I feel that the rule in these cases should be that the material should be submitted to the court in order that the Court as a judicial officer might determine whether or not it should be produced in a given case." The court suggested: "Suppose we do this then, if that is satisfactory—suppose Mr. Kerner produces the material which is within the reach of the subpoena and submits it to counsel for the relator and to counsel for the respondent, and then you can look at it, and then if you have any controversy about it I will act on it, otherwise—." Kerner then interposed to suggest that he was "still under orders not to actually produce the documents." (R. 126-127.)

After Kerner's statement that production of the records might be instrumental in causing the death of certain confidential informants (R. 127; see also R. 129), he asserted that the only item of any possible relevance in the habeas corpus proceeding was the report on the F. B. I. "show up." John-

[2] Later, at Kerner's suggestion, the court ordered that the proceedings in chambers be made part of the record (R. 140).

stone agreed. (R. 128.) Counsel continued (R. 129):

> By Mr. Johnstone: Well, my information is that Factor was there, and Factor would not identify my client Roger Touhy at that show up. And that is the formal fact that I want to determine.
>
> By Mr. Kerner: I will tell you what this statement contains. It is purely a report, and is not evidence, of course. I think we will all agree with that. Factor did not identify him by face. He identified him by voice. And that is all that is in all of these reports that would be of any value anywhere along the line.

After a disagreement between Kerner and Johnstone as to whether this report would be admissible, Kerner remarked that he was "interested in the production of everything that is possible to assist you with your case," and also expressed the desire, concurred in by Johnstone, that they could reach "an agreement for the Judge to look over this one report" (R. 129-130). Responding to Johnstone's inquiries, Kerner promised to supply him with certain information not in the subpoenaed records, i. e., the date when the F. B. I. files on petitioner's case were closed and the circumstances under which petitioner was taken to Elkhorn, Wisconsin, instead of being kept in Illinois. After Kerner had again voiced his fear that production of all the documents in open court would "probably

bring about the death of someone," the following occurred (R. 131):

> By Mr. Johnstone: After all, this is a habeas corpus proceeding. And in a habeas corpus proceeding the broadest possible latitude is given to the trial court. The trial court can examine witnesses, affidavits, depositions, and what have you, all to the end that essential justice may be done.
>
> My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us.
>
> By the Court: I don't want to see them—I don't want to see them without counsel.

Kerner then informed Johnstone that Factor was present at only one show up on July 22, 1933, and that the others present were the persons who were with him the night he was kidnaped. In addition, Kerner disclosed the presence of one Devereux who was described as the agent who made the F. B. I. report involved, Mrs. Factor, Jerome Factor, Epstein and Reddick, who were described as persons "who looked at Touhy." (R. 131-133). Thereupon, Johnstone told the court he did not see how anybody could possibly be injured by producing the reports, to which Kerner answered: "They won't be injured in fact because I want to try to bring this information to you in an informal fashion, because my orders are that I cannot produce these reports. But I am trying to help you as much as I can. * * * I have told

you that before. And that is still my position. If that information is of any value to you, here it is. But I cannot produce the reports." Johnstone then requested the court to require that the Devereux report be produced, whereupon the following colloquy occurred (R. 133-134);

> By the Court: I guess I misunderstood Mr. Kerner this morning. I got the impression, maybe because I wanted to do it, that he was going to submit to counsel, for the consideration of counsel, the papers which are called for by this subpoena; and I understood that counsel would make no announcement of anything in those papers other than such as was really material to the issues before the Court. But I guess I misunderstood you.
>
> By Mr. Kerner: I did not intend actually to bring the reports in because I was still under the orders of the Department.
>
> By the Court: Well, I misunderstood you. Now, I will say to you frankly, if he really insists on this I will use all the power I have to get them.

After the proceedings were resumed in open court, Johnstone made a motion that McSwain be directed to produce the documents specified in the subpoena. Kerner made an objection, not ruled upon by the court, that the service of the subpoena upon him was bad as not constituting valid service upon the Attorney General. (R. 134.) From the witness stand, in response to Johnstone's query as to whether he would produce the documents designated in the subpoena, McSwain

stated: "I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229." The court having announced its intention of holding McSwain guilty of contempt, Kerner advised: "May it please the Court, as counsel for McSwain I too have been in touch with Washington, and we cannot produce those reports, although we should like to, under order from the Attorney General, under Order 3229." (R. 135-136.)

McSwain was adjudged guilty of contempt of court and he was committed to the custody of the Attorney General until he should obey the court's order by producing the records demanded by the subpoena (R. 144-145).

On appeal (R. 146), the Court of Appeals, one judge dissenting, reversed the order of the District Court and remanded the cause with directions that McSwain be discharged from the custody of the Attorney General (R. 174).

ARGUMENT

1. In response to the subpoena *duces tecum* directed to him and the Attorney General, the respondent, McSwain, through the United States Attorney, tendered the sought-after documents to the court "for determination as to [their] materiality to the case and whether in the best public interests the information should be disclosed." Supplement No. 2, set out *supra*, note 1. While the trial judge rejected this tender, petitioner,

throughout this litigation, has expressed his satisfaction with the course proposed by the Government. Thus, as the Statement reveals, petitioner's counsel told the trial court: "As far as I am concerned, I am perfectly willing to have the United States Attorney submit the material to the Court, and abide by the result." (R. 126-127). "My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us." (R. 131). In the light of this position thus taken and adhered to, petitioner cannot and does not complain of the judgment below except to question the finding of the court below that the Government had, in fact, made the tender described.[3] The correctness of that factual appraisal is obviously a question of significance only in this case.

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[3] That is to say, petitioner follows Judge Lindley, dissenting, in the view that McSwain did not in fact tender the subpoenaed documents to the trial court for a determination of their materiality and whether their non-disclosure was essential to the public interest. (R. 172; Pet. 26). But the record reveals that United States Attorney Kerner had acted for McSwain throughout the entire colloquy before the latter took the stand, and the court had held unequivocally that it would not examine the documents to determine their admissibility unless this were done with counsel (R. 131). In these circumstances, it would have been futile for McSwain to offer the documents again for limited examination by the court alone. As the majority opinion states, the court's previous refusal to examine the documents alone "perhaps accounts for the fact that McSwain when on the stand was not requested to make production for such purpose," i.e., for the court "to examine the material for the purpose of determining its materiality and whether it was in the best public interest that such information should be disclosed" (R. 171).

2. Petitioner's basic complaint to this Court is grounded on an incident which took place after the decision of the court below. Relying upon a statement in the Reply Brief for the United States in *United States of America* v. *Cotton Valley Operators Committee, et al.*, No. 490, October Term, 1949, affirmed *per curiam* by an equally divided court on April 24, 1950, 339 U. S. 940, petitioner now argues that Supplement No. 2,[4] pursuant to which the Government took the course that it did in this case, "is not * * * a binding regulation." (Pet. 25). But petitioner misapprehends the import of the Government's statement to this Court in the *Cotton Valley* reply brief. It is one thing to say, as the Government did in that case, that Supplement No. 2 creates no rights in those seeking to obtain confidential government papers, that "In no sense does it bind or obligate the Attorney General." See Pet. 25, quoting the *Cotton Valley* reply brief. It is quite another to suggest, as petitioner does, that Supplement No. 2 or the procedures it outlines is unavailable to the Government and that the Government must, in all cases, stand or fall on an absolute executive privilege. In other words, there is no warrant whatever for suggesting that the Attorney General may not in his discretion waive the executive privilege entirely or on terms.

3. The terms offered in this case, in accordance with Supplement No. 2, were acceptable to peti-

[4] See *supra*, note 1.

tioner, the majority of the court below, and Judge Lindley, dissenting.[5] With petitioner's erroneous reading of the Government's *Cotton Valley* reply brief out of the way, there is plainly no warrant for review by this Court of a course of action acceptable to all parties.[6]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.
ROBERT S. ERDAHL,
ROBERT G. MAYSACK,
Attorneys.

JUNE, 1950.

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[5] "* * * the Department of Justice, acting under power granted by the Congress, has provided by its own directives, a method by which, by judicial decision, the rights of a person seeking to procure evidence in the custody of the Department, are fully protected. In other words, those directives, having provided reasonable protection for the rights of applicants, satisfy constitutional demands." (R. 171-172, dissenting opinion by Judge Lindley.)

[6] Since there was not, in this case, an unqualified refusal to produce the documents involved, questions raised by the petitioner as to the validity of Department of Justice Order 3229, providing for non-disclosure, and the judicial power, under the Constitution, to go behind an executive determination that disclosure should not be made (Pet. 4, 14-24), are not presented for decision.

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